

Application No. 09/841,255

REMARKS

Claims 1-3, 9, 12-15, 23, 24, 26-28 and 30 remain for consideration. Claims 6-8 and 25 are canceled without prejudice to advance prosecution of the application. Claims 26-28 and 30 have been amended. Claim 26 has been amended for clarity as well as to change the upper limit of the average particle size, as recommended by the Examiner. Claims 27, 28 and 30 have been amended for consistency with the amendment of claim 26. No new matter has been introduced by the amendments.

Restriction Requirement

The Examiner withdrew consideration of claims 1-3, 9, 12-15, 23 and 24 in view of an asserted constructive election and proposed distinctions of the inventions. With all due respect, Applicants respectfully assert that the amendments of claims 1 and 15 did not change the nature of the invention in any way. In particular, these are composition claims, and there was no amendment to the composition. The previous amendments only changed the terminology used to describe the compositions. Applicants respectfully assert that the previous amendments of these claims did not change the claim scope so that the prosecution of these claims was not changed by the amendment. At most, the terminology altered a potential use of the materials, but it is well established that the inclusion in a composition claim of a use does not change claim scope for examination. See MPEP 2111.02 II (emphasis added). "If the body of the claim fully and intrinsically sets forth all of the limitations of the claimed invention, and the preamble merely states, for example, the purpose or intended use of the invention, rather than any distinct definition of the claimed invention's limitations, then the preamble is not considered a limitation and is of no significance to claim construction." With all due respect, the amendment of claim preambles that are of no significance to claim construction should not result in a restriction requirement.

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In view of these clarifying comments, Applicants respectfully request consideration of claims 1-3, 9, 12-15, 23 and 24.

Written Description Rejection

The Examiner rejected claim 26 under 35 U.S.C. § 112, first paragraph, as failing to satisfy the Written Description requirement. While Applicants respectfully disagree with the Examiner's legal assertions regarding this rejection, Applicants have amended claim 26 to advance prosecution of the Application. As amended, the claim has explicit literal support for the claim language in the specification. Applicants respectfully request withdrawal of the rejection of claim 26 under 35 U.S.C. § 112, first paragraph, as failing to satisfy the Written Description requirement.

Rejection for Obviousness-Type Double Patenting Over 09/136,483

The Examiner provisionally rejected claim 25 under the judicial doctrine of obviousness-type double patenting over claim 9 of copending Application No. 09/136,483. While Applicants maintain their position regarding the inappropriateness of this rejection based on the respective filing dates, Applicants have canceled claim 25. Thus, this rejection presently moot. Applicants respectfully request withdrawal of the rejection of claim 25 under the judicial doctrine of obviousness-type double patenting over claims 9 of copending Application No. 09/136,483.

Rejection for Obviousness-Type Double Patenting Over 09/433,202

The Examiner provisionally rejected claim 25 under the judicial doctrine of obviousness-type double patenting over claim 58 of copending Application No. 09/433,202. While Applicants strenuously maintain that the obviousness-type double patenting over the '202

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application is not appropriate, Applicants have canceled claim 25 to advance prosecution of this case. Thus, this rejection is presently moot.

Rejection Over U.S. 5,389,194 or U.S. 5,626,715

The Examiner rejected claims 6-8 and 25 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 5,389,194 to Rostoker or under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent 5,626,715 to Rostoker et al. To advance prosecution of this application, Applicants have canceled claims 6-8 and 25. Thus, this rejection is presently moot.

CONCLUSIONS

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

The Examiner is invited to telephone the undersigned if the Examiner believes it would be useful to advance prosecution.

Respectfully submitted,



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